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Case No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1991

JAMES SAFFLE, WARDEN, and
GARY MAYNARD, DIRECTOR, OKLAHOMA
DEPARTMENT OF CORRECTIONS
Petitioners,

v.

MARK ROY LILES,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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October, 1991

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QUESTION PRESENTED

Whether the Tenth Circuit was correct in expanding the holding of Ake v. Oklahoma, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985) to compel the State to furnish a mental health expert where the defendant did not raise or plead insanity as a defense, was found competent to stand trial, and psychiatric evidence was not used against him in the sentencing stage of a trial which occurred before the decision in Ake was handed down.

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PETITION FOR A WRIT OF CERTIORARI
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OPINIONS BELOW

In a federal habeas corpus action, the defendant was granted summary judgment on his claim that Oklahoma violated his rights by not granting his motion for a mental health expert at state expense. The State appealed to the Tenth Circuit, which affirmed the action of the federal district court in

Liles v. Saffle, ____ F.2d ____, 1991 WL 180096 (10th Cir. Sept. 16, 1991). It is from that decision that the State of Oklahoma now seeks certiorari from this Court.

JURISDICTION

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254 (1). Jurisdiction in the district court was conferred by 28 U.S.C. § 2254. Jurisdiction in the Tenth Circuit Court of Appeals was conferred by 28 U.S.C. § 1291.

STATEMENT OF THE CASE

Defendant Liles is incarcerated pursuant to a Judgment and Sentence rendered on July 11, 1983, in the District Court of Oklahoma County, State of Oklahoma, Case No. CRF-82-4268.

Defendant was convicted by a jury of his peers of the crime of Murder in the First Degree. During the sentencing phase of defendant's trial the jury found that the murder was especially heinous, atrocious, or cruel and the existence of a probability that the defendant would commit criminal acts of violence that could constitute a continuing threat to society. Having found the existence of two of the aggravating circumstances necessary under Okla. Stat. Ann. tit. 21, § 701.12 before a penalty of death can be imposed, the jury then assessed the death penalty. The trial court followed the recommendation of the jury. Defendant filed a direct appeal from his conviction, which was affirmed by the Oklahoma Court of Criminal Appeals in

Case No. F-83-427, recorded at Liles v. State, 702 P.2d 1025 (Okla. Crim. App. 1985).

Following the affirmance of his conviction, the defendant filed for a writ of certiorari from the United States Supreme Court which was denied in Liles v. Oklahoma, 476 U.S. 1164, 106 S.Ct. 3341, 92 L.Ed.2d 749 (1986). The defendant then filed his first application for post-conviction relief in the District Court of Oklahoma County on October 24, 1986. After the original application was amended, the trial court denied the application on April 28, 1987. Defendant appealed that denial to the Oklahoma Court of Criminal Appeals, which affirmed the denial in an unpublished order dated July 9, 1987. On September 8, 1987, the defendant

filed a second petition for writ of certiorari with the United States Supreme Court, which was also denied. Liles v. Oklahoma, 484 U.S. 933, 108 S.Ct. 308, 98 L.Ed.2d 266 (1987), rehearing denied 484 U.S. 1021, 108 S.Ct. 738, 98 L.Ed.2d 685 (1988). On May 23, 1988, the defendant filed a second post-conviction application in the District Court of Oklahoma County. That application was denied on June 27, 1988. The Court of Criminal Appeals affirmed the denial of that application on April 25, 1989. In the latest petition for writ of certiorari to the United States Supreme Court, the defendant was denied relief on October 30, 1989. Liles v. Oklahoma, 110 S.Ct. 353, 107 L.Ed.2d 341 (1989).

The defendant then filed his Petition for Writ of Habeas Corpus in the United States District Court for the Western District of Oklahoma, where he was granted summary judgment on his claim that he was unconstitutionally denied his right to a fair trial by the denial of a state provided mental health expert. The Tenth Circuit Court of Appeals affirmed the holding of the district court, and it is from that order that the State now seeks certiorari relief.

REASONS FOR GRANTING THE WRIT

In Ake, this Honorable Court found five factors which it felt mandated the appointment of a State provided-for psychiatrist for a criminal defendant. Those relevant factors in the Ake case were:

> 1) Ake's sole defense was that of insanity.
>
> 2) Ake's bizarre behavior at arraignment caused the trial court, sua sponte, to have Ake examined for competency.
>
> 3) A state psychiatrist found Ake to be incompetent to stand trial, and suggested that he be committed.
>
> 4) When Ake was later found to be competent, it was only on the provision that he be sedated with Thorazine three times a day, during trial.
>
> 5) The psychiatrist who examined Ake for competency described to the trial court the severity of Ake's mental illness less than six months after the offense, and suggested that the mental illness might have begun many years earlier.

Recognizing that insanity is a recognized defense in Oklahoma under which the defendant has the initial burden of producing evidence, this Court then found that "[t]aken together, these factors make clear that the question of

Ake's sanity was likely to be a significant factor in his defense." Ake, 470 U.S. at 86. In an accompanying footnote, the Court said "[w]e express no opinion as to whether any of these factors, alone or in combination, is necessary to make this finding." Ibid, footnote 12. It is the legal question reserved in that footnote which must now be resolved.

Only one of the factors found in Ake is present in this case. Applying those factors to defendant Liles' case, it is apparent that the defendant:

> 1) Never raised, or attempted to raise, the defense of insanity.
>
> 2) Never displayed any signs of bizarre behavior before the trial court, and was examined for competency at the request of his trial counsel. (Doc. 28, State court O.R.[1], pp. 36 - 37).

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[1] Original Record

> 3) Was found competent to stand trial by the state psychiatrist. (Doc. 28, State court O.R., pp. 47 - 48).
>
> 4) Was to remain on Thorazine "to retain his present degree of stability" and was further advised that possible follow-up care at an out patient mental health clinic might be needed. (Doc. 28, State court O.R., p. 48).
>
> 5) Although diagnosed as being aggressive, and having an "intermittent explosive disorder," as well as suffering from alcohol abuse, he was ruled to be competent and "not psychotic." (Doc. 17, Discharge Summary from Eastern State Hospital, Defendant's Documentation of Ake Claim).

The only common factor between defendant Liles' case and the Ake case is that both men were prescribed Thorazine after their release from the state mental health hospital.

The question presented for certiorari review revolves around a

critical issue which has not yet been decided by this Court: "To what extent does the Ake case apply in a pre-Ake criminal trial which did not involve an insanity defense or mental health evidence in aggravation?" Under the Tenth Circuit's holding, Ake has been extended to require that a mental health expert be provided in any criminal case in which an expert could possibly be beneficial to the defense.

The federal district court's opinion held that the Ake doctrine requires that "a state provide access to the psychiatric assistance necessary to prepare an effective defense based on mental condition if a criminal defendant cannot otherwise afford such assistance." (Liles v. Saffle, Western District Case No. CIV-89-2271-W,

Judgment dated November 7, 1990, pp. 4 - 5). The decision below would not require a defendant to plead insanity as a defense, but would rather allow a court appointed psychiatrist in the first instance, before insanity was plead or raised, to determine whether or not sanity should or could be utilized as a defense. Such a holding, the State submits, makes a mental health expert an integral part of every criminal trial which involves a crime requiring specific intent.

Neither did the lower courts accept the narrow dictates of Ake which hold that a State appointed psychiatrist must only be provided for second stage assistance where the State first uses psychiatric evidence in aggravation. In Ake, this Court found that where the

State presents psychiatric evidence of the defendant's future dangerousness, the defendant is entitled to psychiatric assistance to attempt to rebut that evidence. Ake, 470 U.S. at 83 - 86; Harris v. Vasquez, 913 F.2d 606 (9th Cir. 1990). Recognizing that the Liles decision is an expansion of this Court's holding in Ake, the Tenth Circuit held:

> Although the Court discussed the necessity of psychiatric assistance to enable a defendant to respond to and challenge the state's psychiatric assistance to enable a defendant to respond to and challenge the state's psychiatric evidence concerning future dangerousness, the Court did not expressly limit a defendant's right of psychiatric assistance to situations where the state first presents psychiatric evidence. . . In this case, because the state presented evidence concerning petitioner's future dangerousness, albeit not psychiatric evidence, and because petitioner established the likelihood that his mental condition could have been a

> significant mitigating factor, the district court correctly determined that the state trial court deprived petition of due process by denying him court-appointed psychiatric assistance at the sentencing phase of his trial.

Liles v. Saffle, ____ F.2d ____, 1991 WL 180096, pp. 7 - 8 (10th Cir. Sept. 16, 1991). The Tenth Circuit has held that psychiatric assistance in second stage is not limited to those instances where the State uses psychiatric evidence in aggravation, but in all cases where future dangerousness is an issue. Thus, any time the aggravating circumstance of continuing threat to society is alleged, a mental health expert must be appointed for the defendant.

The holding of Ake is narrow. A defendant is entitled to state provided mental health assistance only if he makes a threshold showing that his

mental condition is to be a significant factor at trial. Clisby v. Jones, 907 F.2d 1047 (11th Cir. 1990); Jackson v. Ylst, 921 F.2d 882 (9th Cir. 1990); Silagy v. Peters, 905 F.2d 986 (7th Cir. 1990); Harris v. Vasquez, supra.

For a thorough discussion on the breadth of the Ake holding, see Kordenbrock v. Scroggy, 919 F.2d 1091 (6th Cir. 1990). As Judge Kennedy wrote in his separate opinion in that case:

> Appellant's constitutional rights under Ake were not violated. Ake's guarantee of a state-funded psychiatrist arises only after defendant shows that his sanity will be "a significant factor at trial." (Citations omitted). Appellant never attempted to raise insanity as a defense. At most he sought to show that his capacity was diminished through drug and alcohol use, thus depriving him of the specific intent necessary to convict him of intentional murder. Although Ake does not establish a bright line test for determining when

> a defendant has demonstrated that "sanity at the time of the offense will always be a significant factor," it is clear that "Ake requires that the defendant, at a minimum, make allegations supported by a factual showing that the defendant's sanity is in fact at issue in the case." (Citations omitted). Such a showing is not made by merely positing that appellant was a habitual drug and alcohol abuser.

Kordenbrock, 919 F.2d at 1119. Defendant Liles never made a factual showing that his sanity was to be an issue in his case. In the underlying federal habeas action, the defendant attempted to show that he could have made such a showing, utilizing in part new psychiatric evidence to attempt to prove that his sanity was a real issue at the time of the crime, and at trial. In the most recent denial of federal

habeas relief[2] in the Harris case, the Ninth Circuit refused to consider the testimony of new psychiatric experts who attempted to rebut the psychiatric evidence presented at trial. The Ninth Circuit stated:

> The availability of such a judicial evaluation in a federal habeas proceeding would allow a defendant who has been given access to competent psychiatric assistance under Ake to establish a constitutional infirmity to his death penalty through the opinions of new psychiatrists who, eleven years later, offer different opinions.

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[2]The latest Harris decision is to be reported at Harris v. Vasquez, 943 F.2d 930 (9th Cir. 1991), but has not yet been reported. It was accessed on WestLaw. An earlier case, Harris v. Vasquez, 913 F.2d 606 (9th Cir. 1990) has been cited above.

Harris v. Vasquez[3]. The Ninth Circuit went on to hold that to allow an evidentiary hearing utilizing the "new" psychiatric evidence in an attempt to rebut the evidence at trial would be to establish a new rule under Teague v. Lane, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989), and was impermissible.

In a case such as this, which was tried before Ake, the Tenth Circuit has held that the defendant must show that he could have made a threshold showing under Ake that his sanity at the time of the offense was to be a significant issue at trial. Cartwright v. Maynard, 802 F.2d 1203 (10th Cir. 1986). Here,

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[3]Publication page references for the federal reporter are not yet available. This citation occurs at page 87 in the WestLaw edition of this opinion.

the Tenth Circuit allowed the defendant to use new evidence to attempt to meet this standard. The Tenth Circuit considered defendant Liles' "new" psychiatric evidence presented by Dr. Russell Monroe, who examined only the defendant's hospital records some eight (8) years after the fact, and by self-serving affidavits from the defendant's family made some seven (7) to eight (8) years after trial. The Tenth Circuit wrongly considered this evidence in deciding whether or not the defendant could have made a showing that his sanity was to be a significant issue at trial. What should have been used to decide the issue was the existing medical records at the time, which clearly indicated that the defendant, though perhaps mentally disturbed, was

competent to stand trial, and was legally sane.

In originally deciding this case, the Court of Criminal Appeals considered the holding of Ake and found that the defendant had failed to demonstrate to the trial court his sanity was to be a significant factor at trial. Liles, 702 P.2d at 1033. As the Court explained:

> Appellant never plead or attempted to prove an insanity defense. In applying for the funds, appellant failed to show cause for doubting his sanity. Counsel on appeal suggests that the fact appellant was placed on psychotropic drugs at the State mental hospital is sufficient to raise doubts as to his mental state. But we consider this circumstance inadequate to demonstrate that insanity would be a key factor to appellant's defense at trial, or that his mental condition was seriously in question.

Liles, 702 P.2d at 1034. The Court of Criminal Appeals distinguished the facts of Mr. Liles' case to Ake.

> This case is much different than that of Ake, supra, which involved a defendant diagnosed as psychotic and who advised the court that he would raise a defense of insanity at trial. In that case, the State presented psychiatric evidence against the defendant. We find that the trial court in the instance case did not err in denying appellant's motion for the requested funds.

Liles, 702 P.2d at 1034. The holding of Ake is that:

> [W]hen a defendant has made a preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial, the Constitution requires that a State provide access to a psychiatrist's assistance on this issue, if the defendant cannot otherwise afford one.

Ake, 84 L.Ed.2d at 60. The Oklahoma Court, in interpreting Ake, has held that mere undeveloped assertions that

the requested psychiatric or psychological assistance would be beneficial is insufficient to establish a due process violation. See, Castro v. State, 745 P.2d 394, 399 (Okla. Crim. App. 1987); Liles, 702 P.2d at 1033.

Other states have also applied a narrow interpretation to the Ake decision. In the very recent case of North Carolina v. Roper, _402 S.E.2d 600 (N.C. 1991), the North Carolina Supreme Court held:

> [T]his Court, consistent with post-Ake decisions, has held that in addition to a threshold showing of a "significant factor," which has been interpreted to mean a "specific necessity," the defendant "must demonstrate either that without expert assistance he will be deprived of a fair trial, or that there is a reasonable likelihood that it will materially assist him in the preparation of his case." (Citations omitted).

North Carolina v. Roper, 042 S.E.2d at 609. And, in the case of Christenson v. Georgia, 402 S.E.2d 41 (Ga. 1991), the Georgia court held that Christenson had presented no evidence by which the trial could reasonably have inferred that the question of sanity would be a significant factor at trial. As the court in that case stated:

> The evidence in this case shows that the defendant is selfish and manipulative, lacks regard for the rights of others, has abused drugs and alcohol, and has committed numerous crimes. But it does not show that the defendant suffers from any serious mental disorder. It was not abuse of discretion to deny the defendant's request for court-funded psychiatric assistance.

Christenson v. Georgia, 402 S.E.2d at 46. See also Kansas v. Owens, 807 P.2d 101 (Kan. 1991).

The Tenth Circuit's holding has expanded Ake beyond its original intent, contrary to this Court's holding, the decisions in other circuits, and the highest state courts. Under the Tenth Circuit's holding, a criminal defendant is entitled to a state appointed mental health expert merely on an assertion that such an expert would be beneficial and could possibly provide assistance to the defense at trial or during second stage. The Tenth Circuit's very specific holding also requires that state provided psychiatric assistance is mandated where the defendant's future dangerousness is an issue, regardless of the lack of psychiatric evidence presented by the State. Thus, in all cases in which Oklahoma's aggravating circumstance of "continuing threat to

society" is alleged, the defendant must be furnished with a court appointed expert to assist him.

CONCLUSION

The Tenth Circuit has impermissibly expanded the holding of Ake v. Oklahoma beyond the dictates of this Court, and the clear weight of authority from the other circuits, and the highest state courts. Thus, this Honorable Court should grant certiorari in order to clarify the reserved issue of law in the Ake decision and to provide uniform guidance to the circuits regarding the breadth of that holding.

Respectfully submitted,

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PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

MARK ROY LILES, Petitioner-Appellee, v. JAMES L. SAFFLE, Warden, State Penitentiary at Mclester, Respondent-Appellant, and GARY MAYNARD, Director, Oklahoma Department of Corrections; ROBERT H. HENRY, Attorney General of Oklahoma, Respondents.	)	No. 90-6380

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA (D.C. No. CIV-89-2271-W)

Submitted on the briefs:

William J. Mertens of Swindler & Berlin, Chartered, Washington, D.C., and Patti Palmer, Oklahoma Appellate Public Defender System, Norman, Oklahoma, for Petitioner-Appellee.

Robert H. Henry, Attorney General of the State of Oklahoma and A. Diane Hammons, Assistant Attorney General, Oklahoma City, Oklahoma, for Respondent-Appellant.

Before SEYMOUR, EBEL, Circuit Judges, and BABCOCK, ** District Judge.

**Honorable Lewis T. Babcock, District Judge, United States District Court for the District of Colorado, sitting by designation.

SEYMOUR, Circuit Judge.

Respondent James L. Saffle appeals from the district court's order granting habeas relief to petitioner Mark Roy Liles, under 28 U.S.C. § 2254, from his

conviction for first degree murder and sentence of death.[1] In vacating the conviction, the district court determined that, under Ake v. Oklahoma, 470 U.S. 68 (1985), the state trial court had deprived petitioner of due process by denying his pretrial motion for state funds to employ a psychiatrist in aid of his defense. We affirm.

On August 31, 1982, the State of Oklahoma charged petitioner with murder occurring during the commission of an armed robbery. See Okla. Stat. Ann. tit. 21, § 701.7B. A jury convicted petitioner of first degree murder and

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[1] After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

sentenced him to death, finding the existence of two aggravating factors: the killing was especially heinous, atrocious, or cruel, and petitioner posed a continuing threat to society. See Okla. Stat. Ann. tit. 21, § 701.12.

The Oklahoma Court of Criminal Appeals upheld petitioner's conviction. Liles v. State, 702 P.2d 1025 (Okla. Crim. App. 1985), cert. denied, 476 U.S. 1164 (1986). He subsequently challenged his conviction and sentence through two state post-conviction proceedings, again without avail. Liles v. State, No. PC-87-391 (Okla. Crim. App. July 9, 1987), cert. denied, 484 U.S. 933 (1987); Liles v. State, No. PC-88-589 (Okla. Crim. App. Apr. 25, 1989), cert. denied, 110 S. Ct. 353 (1989).

Petitioner then filed this petition for habeas relief in the United States District Court for the Western District of Oklahoma, asserting thirteen grounds for relief. He moved for summary judgment on the ground that the trial court had deprived him of due process by denying his motion for funds to employ a psychiatric expert. The district court granted petitioner's motion for summary judgment, relying upon Ake, 470 U.S. 68.[2]

---

[2] Because the United States Supreme Court decided Ake while petitioner's direct appeal was pending, this case does not present a retroactivity issue. See Griffith v. Kentucky, 479 U.S. 314, 322-23 (1987). Further, the parties do not dispute that petitioner has exhausted his state court remedies concerning the issue presented by this appeal. See generally White v. Meachum, 838 F.2d 1137, 1138 (10th Cir. 1988).

On appeal, respondent challenges the district court's determination that the trial court deprived petitioner of due process by denying him psychiatric assistance at both the guilt and the sentencing phases of his trial. This court will review an order granting summary judgment de novo. Abercrombie v. City of Catoosa, 896 F.2d 1228, 1230 (10th Cir. 1990). Summary judgment is appropriate only if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Id.; Fed. R. Civ. P. 56(c) (1991).

The Supreme Court premised its decision in Ake on the principle that "a criminal trial is fundamentally unfair if the State proceeds against an indigent defendant without making

certain that he has access to the raw materials integral to the building of an effective defense." 470 U.S. at 77. Applying that principle to the issue of "whether, and under what conditions, the participation of a psychiatrist is important enough to preparation of a defense to require the State to provide an indigent defendant with access to competent psychiatric assistance in preparing the defense," id., the Court determined that, although

> [a] defendant's mental condition is not necessarily at issue in every criminal proceeding, . . . when a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in

> evaluation, preparation, and presentation of the defense.

Id. at 82-83. Similarly, under certain circumstances, due process also entitles a criminal defendant to court-appointed psychiatric assistance during the sentencing phase of a capital proceeding. Id. at 83-84.

A criminal defendant is entitled to psychiatric assistance at trial when he is able to make "an ex parte threshold showing to the trial court that his sanity is likely to be a significant factor in his defense." Id. at 82-83. See United States v. Austin, 933 F.2d 833, 841 (10th Cir. 1991).

> [I]f "sanity" or "mental capacity" defenses [are] to be defense issues, they must be established by a "clear showing" by the indigent defendant as "genuine," "real" issues in the case. In order for a defendant's mental state to become a

> substantial threshold issue, the showing must be clear and genuine, one that constitutes a "close" question which may well be decided one way or the other. It must be one that is fairly debatable or in doubt.

Cartwright v. Maynard, 802 F.2d 1203, 1211 (10th Cir. 1986)(citing United States v. Sloan, 776 F.2d 926 (10th Cir. 1985)), rev'd on other grounds, 822 F.2d 1477, 1478 n.2 (10th Cir. 1987) (en banc), aff'd, 486 U.S. 356 (1988). General allegations supporting a request for court appointment of a psychiatric expert, without substantive supporting facts, and undeveloped assertions that psychiatric assistance would be beneficial to the defendant will not suffice to require the appointment of a psychiatrist to aid in the preparation of a criminal defense. Davis v.

Maynard, 869 F.2d 1401, 1407 (10th Cir. 1989), vacated on other grounds, 110 S. Ct. 1516 (1990); Cartwright, 802 F.2d at 1211.

In cases such as this, in which the trial court denied a criminal defendant court-appointed psychiatric assistance prior to the Supreme Court's determination in Ake, but to which Ake's standard applies, the question presented is whether, "upon review of the entire record, [petitioner] could have made a threshold showing under Ake that 'his sanity at the time of the offense is to be a significant factor at trial . . . .'" Cartwright, 802 F.2d at 1212 (emphasis in original). The record before this court supports the district

court's determination that petitioner could have made this showing.[3]

The State of Oklahoma charged petitioner with first degree murder on August 31, 1982. He was already in police custody at that time. On February 9, 1983, court-appointed defense counsel applied to the state trial court for a determination of petitioner's competency, asserting that petitioner's "mental state and communications abilities [were] such that they seriously interfere[d] with his understanding of the proceedings against him and with his capability of aiding . . . in preparation for trial."

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[3] We have supplemented the record on appeal with petitioner's Documentation of Ake Claim and his Evidentiary Submission, both filed with the district court. See 10th Cir. R. 10.2.4.

State Court Rec., vol. I, at 37. Defense counsel also requested that the trial court waive the notice requirement for the competency hearing, asserting that petitioner "is unable to communicate with his attorney to inform him of any relatives residing within or outside . . . Oklahoma." Documentation, Ake claim, exh. 2. The trial court consented to waive the notice requirement. Id.

The next day, after conducting a hearing on the application for a competency determination, the trial court ordered petitioner committed to the Oklahoma Department of Mental Health for sixty days for observation and examination, stating "there is a doubt as to the present competency of the said [defendant], by reason of personal

observation of the defendant by this Court; and testimony regarding defendant's ability to understand the proceedings against the defendant and the defendant's capability of aiding the attorney in preparation for trial." Id., exh. 1.

A month later, R. D. Garcia, M.D., the chief forensic psychiatrist at Eastern State Hospital where petitioner was confined, reported to the trial court that the hospital staff had determined that petitioner was capable of understanding the proceedings against him and of assisting his attorney with his defense and, that "[s]ince it is the consensus of our staff that [petitioner] is not in need of psychiatric treatment, we would therefore consider him as competent to stand trial at this time."

Id., exh. 3 at 1. The report also indicated that petitioner had not displayed any behavior that would indicate that he should be considered dangerous to himself or others, "at least not as a result of any overt psychotic symptoms elicited during his period of confinement in the hospital." Id. at 2.

The report further noted, however, that petitioner was being treated daily with 150 milligrams of Thorazine, a powerful antipsychotic medication, see Physician's Desk Reference 2116 (44th ed. 1990), as well as 400 milligrams of Tegretal [Tegretol], an anticonvulsant medication, see id. at 988, and four milligrams of Cogentin, a medication used to treat parkinsonism, a common side effect of Thorazine, see

id. at 1337. Documentation, Ake claim, exh. 3 at 2. The report to the court "of course recommend[ed] that this treatment be continued in order for [petitioner] to retain his present degree of stability." Id.

Relying upon the hospital's evaluation, the state trial court determined that petitioner was competent to stand trial. Evidentiary submission, exh. 3. Petitioner returned to the Oklahoma County jail, where, according to jail records, he was medicated with Haldol, yet another antipsychotic medication, see Physician's Desk Reference at 1282. Documentation, Ake claim, exh. 6.

Although Dr. Garcia noted in his report to the court that petitioner was well behaved while confined at the

hospital and did not present any management problems, documentation, Ake claim, exh. 3 at 2, Dr. Garcia's notes also reflect that petitioner had to be secluded for combative behavior on February 18 and March 3 and 4, 1983. Id., exh. 5 (state hospital records). In addition, on March 3, the staff also noted "definite sociopathic behavior" from petitioner. Id.

On February 25, 26, 27, 28, and 29, the staff had to medicate petitioner with 100-milligram doses of Thorazine in order to control his combative or agitated behavior. Id. Petitioner's behavior continued to require administration of 400 milligrams of Thorazine daily, from March 1 through March 7, when the dosage was reduced to

150 milligrams a day.[4] Id. Dr. Garcia

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[4] In his dissent to the affirmance of petitioner's conviction on direct criminal appeal, Judge Parks noted that petitioner's treatment with antipsychotic medication should have indicated to the trial court that there were serious concerns presented regarding petitioner's mental condition.

> [T]he psychiatric report indicated that during the period of the psychiatric examination, the [petitioner] was being maintained on 150 milligrams of Thorazine per day. Thorazine is an extremely powerful psychotropic drug. Its most common use is for the management of manifestations of psychotic disorders. See Physician's Desk Reference (39th Ed. Barnhart 1985), at 1977. In a special warning box, the Physician's Desk Reference states that Thorazine "is not the first drug to be used in therapy for most patients with non-psychotic anxiety because certain risks associated with its use are not shared by common alternative treatments . . . . When used in the treatment of non-psychotic anxiety [it] should not be

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administered in doses of not [sic] more than 100 mg. per day . . . ." Id. Therefore, assuming that the State's doctors were following standard medical practice, the fact that [petitioner] was being maintained on 150 milligrams of Thorazine per day strongly indicates that the doctors were concerned with "the management of manifestations of psychotic disorders." [Further], the psychiatric report recommended that the [petitioner] continue his Thorazine treatment "in order for him to retain his present degree of stability." The fact that Thorazine therapy was administered during the [petitioner's] psychiatric examination and the recommendation for continuation belie the psychiatric report's assertion that the [petitioner] was "not in need of psychiatric treatment," and indicate that the doctors entertained serious concern about his mental stability. . . . [T]he doctor's concern about [petitioner's] mental condition was further

recommended this medication continue after petitioner's release from the hospital. Id., exh. 3 at 2. On the day of his release, March 17, petitioner's agitated behavior required two milligrams of Ativan, an anti-anxiety medication, see Physician's Desk Reference at 2348. Documentation, Ake claim, exh. 5.

In addition to this treatment, the hospital staff implemented precautions in caring for petitioner, in light of his depression and threatened suicide. Id. Petitioner also received medication

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> illustrated by the fact that the psychiatric report suggested that [petitioner] be referred "to a mental health clinic in his locale for follow-up care on an out-patient basis as might be indicated."

Liles, 702 P.2d at 1039.

for insomnia and headaches throughout his stay at the hospital. Id.

Further notations in the hospital records indicate that, on March 1, petitioner experienced "strong inner feelings of wrath and anger" that he believed to be the product of his being possessed by a "violent alter ego" named Rock. Id. Several days later, petitioner became very angry, stating that he would "kill someone on the ward before the night [was] over," and claiming that he was no longer himself, but had become Rock and that Rock would take care of things. Id. At that time, petitioner claimed Rock had committed the murder. Id.

Dr. Garcia noted that petitioner "may be considered potentially dangerous, daring, with temper tantrums and a short

fuse, very easily ready to fight, as an aggressive and explosive individual, but not psychotic." Id. Dr. Garcia ultimately diagnosed petitioner as having a dysthmic personality disorder and an intermittent explosive disorder, along with a continuous alcohol dependence and episodic mixed substance abuse. Id. Notations in the records also indicated petitioner suffered from an "organic personality syndrome (intermittent explosive disorder)" and "mild focal brain damage secondary to cerebral trauma." Id.

Lance A. Portnoff, Ph.D., a clinical neuropsychologist and a consultant at Eastern Hospital, reported that, after examining and testing petitioner, his findings

> are suggestive of bilateral tempero-limbic dysfunction

secondary to brain trauma and polydrug abuse . . . . These findings are consistent with the reported episodes of dyscontrol, which can occur with such a locus of damage because of irritation or disinhibition of limbic structures mediating instinctual aggressive drives . . . . [T]he behavior described by the patient is consistent with an organic intermittent explosive disorder secondary to traumatic contusion of mesial hemisphere structures. Such patients have diminished control over aggressive patterns of response, particularly if further disinhibiting influences such as drugs or alcohol are ingested. Because of the close proximity of limbic aggressive and memory structures, often the irritative effect which triggers tendencies for explosiveness also impairs memory encoding for the duration of the irritative ictus.

. . . .

[T]hese test findings are more consistent with a nonpsychotic [rather] than

> psychotic mental status, characteristic of adjustment disorder of mixed emotional features, organic personality syndrome (intermittent explosive disorder), alcohol abuse, continuous, mixed substance abuse, unspecified, and mild focal brain damage secondary to cerebral trauma.

Id.

In his subsequent affidavit, Dr. Portnoff further explained that

> the results of my evaluation [of petitioner in 1983] were consistent with the presence of an organic impairment, or physical dysfunction to [petitioner's] brain. The results suggested the presence of an organic intermittent explosive disorder secondary to traumatic contusion of mesial hemisphere structures. Persons experiencing this problem may have a diminished ability to control aggressive impulses, and, as a result of damage to their brains, they may be capable of explosive, violent behavior during ictal, or seizure-like states. They

> may then have no memory or impaired memory of their violent behavior.

Id., exh. 8 at 1 (Affidavit of Lance A. Portnoff, Ph.D. (March 17, 1990)).

In corroboration of Dr. Portnoff's diagnosis, petitioner offered the affidavit of Russell R. Monroe, M.D., a professor of psychiatry at the University of Maryland School of Medicine. After examining petitioner's hospital records, Dr. Monroe

> concluded that there is a significant possibility that [petitioner] experiences an episodic behavioral disorder associated with a limbic ictus. Such a condition may lead an individual to commit acts of violence over which he lacks control in an ordinary sense, and which are not in an ordinary sense intentional. The possibility of a behavioral disorder associated with a limbic ictus is consistent with the findings in the February 25, 1983 neuropsychological

> evaluation conducted by L.A. Portnoff, Ph.D.
>
> . . . .
>
> In my opinion, further evaluation . . . is justified by the significant possibility that if [petitioner] indeed killed Mr. Yarbrough, he did so as a result of a brain disorder that produced a seizure-like event.

Id., exh. 9 at 1-2, 3 (Affidavit of Russell R. Monroe, M.D. (October 24, 1988)).

In addition to Dr. Portnoff's findings concerning possible mental conditions affecting petitioner, Dr. Portnoff reported, on February 25, 1983, that although petitioner had a factual and rational understanding of the charges against him, because of his depression, he was at that time incompetent to stand trial. Id., exh. 5. In his affidavit, Dr. Portnoff explained

that his competency determination was not included in the hospital's report to the trial court because he "was considered a consultant only, and was not a part of the forensic team assigned to [petitioner] at Eastern State Hospital." Id., exh. 8 at 1. Dr. Portnoff further asserted that

> [a]t that time it was the policy of Eastern State Hospital to report to the trial courts only the opinion on competency of their Chief Forensic Psychiatrist, Dr. R.D. Garcia. Any dissenting views from other staff members were not reported. At that time Dr. Garcia's view of competency to stand trial evaluations would have prevented him from considering either [petitioner's] depression or his apparent brain damage in determining competency. Dr. Garcia was of the belief that only psychotic individuals could be considered incompetent, and any individual who was non-

> psychotic was therefore competent.
>
> . . . .
>
> In the time I was employed at Eastern State Hospital by far most of the patients I saw there I considered to be competent. In my opinion [petitioner's] depression and incompetency [were] very real, and he was in no way malingering.

Id. at 1-2.

In an effort to suggest possible causes for petitioner's brain injuries, the affidavit of petitioner's mother asserted that he suffered physical and sexual abuse as a child, periods of head banging, head injuries from an automobile accident in which his head went through the windshield, repeated headaches, and episodes of sleepwalking. Evidentiary submission, exh. 29 (Affidavit of LaDonna Meadows (March 21, 1990)). A childhood acquaintance of

petitioner also attested to the fact that, when petitioner was fourteen years old, he fell approximately fifteen feet off a cliff, hit his head, and was unconscious for a time. Id., exh. 30 (Affidavit of Chuck Richmond (March 16, 1990)). The hospital records indicate petitioner said that he had suffered repeated minor head trauma from boxing. Documentation, Ake claim, exh. 5.

In her affidavits, petitioner's mother also stated that a psychiatrist treated petitioner for a time while he was in elementary school, Affidavit of LaDonna Meadows (June 3, 1987), and that, prior to his joining the Marines at age seventeen, petitioner had serious psychological problems, including exhibiting a split personality, Affidavit of LaDonna Meadows (June 4,

1987). "There were times when [petitioner] would only respond to you if you called him by the name of 'Rock.' There were times that he would disappear into the woods for days, and not remember much about it." Evidentiary submission, exh. 29 at 4. Petitioner's mother further attested that, while petitioner was in the Marines, she received notice from the Marine Corps that he had received psychiatric treatment. Id.

Petitioner's mother chronicled several episodes of explosive violence occurring throughout petitioner's life. He had, at various times, attempted to strike his mother, attempted to cut his brother with a broken bottle, and threatened to shoot his brother. Affidavit of LaDonna Meadows (June 3,

1987). He had also beaten his girlfriend, then disappeared for several days, finally emerging from the woods in a dazed state. Id. Petitioner's mother also witnessed occurrences suggesting to her that petitioner had killed his prized pet pit bulls. Id. When asked about the pets, petitioner insisted someone had killed them while he was away from home. Id.

Immediately preceding the murder, petitioner's pregnant wife had left him. Affidavit of LaDonna Meadows (June 4, 1987). Petitioner, according to his mother's affidavit, fell into a deep depression and again was found wandering dazed in the woods. Id. At the time of the murder, petitioner was in Oklahoma searching for his wife. Id.

In light of petitioner's history of mental problems, his treatment with antipsychotic medication, and the conflicting diagnoses of his incompetency and his mental condition in general, this record sufficiently supports the district court's determination that petitioner could have made a sufficient showing, under Ake, that his sanity was likely "to be a significant factor at trial." See Cartwright, 802 F.2d at 1212.

Respondent contends that petitioner cannot claim the state court's denial of a court-appointed psychiatrist deprived him of due process because he failed to assert an insanity defense at trial, unlike the defendant in Ake who presented an insanity defense even though the trial court had denied him

psychiatric assistance. See 470 U.S. at 72. In his motion seeking state funds in order to employ a psychiatrist or psychologist, defense counsel did assert that he had

> reason to believe that [petitioner] suffers from mental disease or defect, that would affect his capacity to appreciate the wrongfulness of his conduct or conform his [conduct to the] requirements [of the] law.
>
> . . . .
>
> The need for a psychologist [or] psychiatrist is clear . . . . Clearly, there is a need to determine whether [petitioner] had the ability to distinguish right from wrong at the time he allegedly committed these particular acts. A determination of this fact is relevant and material in determining guilt. It is further necessary for determining mitigating circumstances as authorized in 21 O.S. 1976 Supp. § 701.10.

Evidentiary submission, exh. 4 at 2.

In Ake, the Supreme Court held that, upon the requisite showing, a criminal defendant will be entitled to "access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." 470 U.S. at 83 (emphasis added). One of the functions of such a court-appointed psychiatric expert, therefore, is to assist the defense in determining whether an insanity defense is viable or warranted under the circumstances of a particular case. Id. at 82; see also Smith v. McCormick, 914 F.2d 1153, 1157 (9th Cir. 1990); United States v. Fazzini, 871 F.2d 635, 637 (7th Cir.), cert. denied, 110 S. Ct. 517 (1989). "The right to psychiatric assistance .

. . means the right to use the services of a psychiatrist in whatever capacity defense counsel deems appropriate--including to decide, with the psychiatrist's assistance, not to present to the court particular claims of mental impairment." Smith, 914 F.2d at 1157. Petitioner is therefore not precluded from asserting a due process challenge to the denial of his motion seeking a court-appointed psychiatrist simply because he did not proceed with an insanity defense after the denial of his motion for court-appointed psychiatric assistance. Indeed as the Court recognized in Ake, given the complex nature of mental disease, "the testimony of psychiatrists can be crucial and 'a virtual necessity if an insanity plea is to have any chance of

success.'" Ake, 470 U.S. at 81 (citation omitted).

Respondent next argues that petitioner cannot establish his entitlement to psychiatric assistance at the penalty phase of his trial because the state did not present any psychiatric evidence concerning the aggravating factor of petitioner's future dangerousness. In Ake, the Supreme Court determined that the state court had deprived the defendant of due process by denying him court-appointed psychiatric assistance in "presenting evidence to rebut the State's evidence of his future dangerousness." 470 U.S. at 83. The Court held that due process entitles a criminal defendant to psychiatric assistance "when the State presents psychiatric evidence of the

defendant's future dangerousness." Id. Although the Court discussed the necessity of psychiatric assistance to enable a defendant to respond to and challenge the state's psychiatric evidence concerning defendant's future dangerousness, the Court did not expressly limit a defendant's right of psychiatric assistance to situations where the state first presents psychiatric evidence. See id, at 83-84. Rather, the Court stated that "[t]he variable on which we must focus is . . . the probable value that the assistance of a psychiatrist will have in this area, and the risk attendant on its absence." Id. at 84. In this case, because the state presented evidence concerning petitioner's future dangerousness, albeit not psychiatric

evidence, and because petitioner established the likelihood that his mental condition could have been a significant mitigating factor, the district court correctly determined that the state trial court deprived petitioner of due process by denying him court-appointed psychiatric assistance at the sentencing phase of his trial.

The judgment of the United States District Court for the Western District of Oklahoma granting petitioner habeas relief is AFFIRMED. The stay of the district court's order is dissolved. Respondents are to release petitioner from custody on the ninety-first day following the date of this opinion unless, within ninety days from the date of this opinion, the State of Oklahoma has elected to retry petitioner.

EXHIBIT "B"

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF OKLAHOMA

MARK ROY LILES, Petitioner, v. JAMES SAFFLE, Warden, Oklahoma State Penitentiary, GARY MAYNARD, Director, Oklahoma Department of Corrections, and ROBERT H. HENRY, Attorney General of Oklahoma, Respondents.	)))))CIV-89-2271-W))))))))))

JUDGMENT

Having determined that the petitioner's Motion for Summary Judgment should be granted and his conviction in Case No. CRF-82-4268 vacated, the Court hereby enters judgment in favor of the petitioner, Mark Roy Liles, and against

the respondents, James Saffle, Warden, Oklahoma State Penitentiary, and Gary Maynard, Director, Oklahoma Department of Corrections. As stated in this Court's Order, the respondents are to release the petitioner from custody on the 91st day following the date of this Order and Judgment, unless, within 90 days from the date of the Order and Judgment, the State of Oklahoma has elected to retry the petitioner.

Dated at Oklahoma City, Oklahoma, this 1 day of November, 1990

LEE R. WEST
UNITED STATES DISTRICT JUDGE

EXHIBIT "C"

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF OKLAHOMA

MARK ROY LILES,	)	
	)	
Petitioner,	)	
	)	
v.	)	CIV-89-2271-W
	)	
JAMES SAFFLE, Warden, Oklahoma State Penitentiary, GARY MAYNARD, Director, Oklahoma Department of Corrections, and ROBERT H. HENRY, Attorney General of Oklahoma,	)	
	)	
Respondents.	)	

O R D E R

On December 29, 1989, as amended, March 20, 1990, Mark Roy Liles filed a Petition for Writ of Habeas Corpus in this Court pursuant to title 28, section 2254 of the United States Code. Petitioner Liles was charged by

information[1] filed August 31, 1982, with one count of murder in the first degree in the death of Joe E. Yarbrough, in that the petitioner "willfully and unlawfully" killed Mr. Yarbrough by stabbing him with a knife during the commission of a robbery.

The petitioner was tried before The Honorable William S. Myers, Jr., District Judge, and convicted by a jury in the District Court of Oklahoma County, Oklahoma. State v. Liles, No. CRF-82-4268. The jury recommended a

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[1] Also named in the information as defendants were the petitioner's brother, Daniel Genel Liles, and Daniel's girlfriend, Gail Marie Conner. Daniel Liles was tried with the petitioner and received life imprisonment. Ms. Conner's trial was severed. She was permitted to plead guilty to a charge of manslaughter in the first degree. She was sentenced to twenty years in prison with ten of those years suspended.

sentence of death after finding two statutory aggravating circumstances.[2] The judgment and sentence of death imposed by the trial court[3] on July 11, 1983, pursuant to the jury's verdicts were thereafter appealed to the Oklahoma Court of Criminal Appeals.

The state court denied the appeal on June 20, 1985, and by a divided vote, affirmed the petitioner's conviction. Liles v. State, 702 F.2d 1025 (Okla.

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[2] The jury found that the killing was "especially heinous, atrocious, or cruel" and that the petitioner, if permitted to live, would commit "acts of violence that would constitute a continuing threat to society."

[3] In a report filed with the Oklahoma Court of Criminal Appeals, Judge Myers wrote that "[i]t was a close decision as to whether life imprisonment or death would be imposed" and that he "was a little surprised by the Death Sentence."

Crim. 1985). A Petition for Writ of Certiorari was lodged with the United States Supreme Court. This petition was denied on June 1, 1986. Liles v. Oklahoma, 476 U.S. 1164, reh'g denied. 478 U.S. 1028 (1986).

Petitioner Liles then filed an Application for Post-Conviction Relief, as amended, in the District Court of Oklahoma County, Oklahoma. The amended application was denied without a hearing by The Honorable James B. Blevins, District Judge, on April 28, 1987. An appeal from this decision was filed with the Oklahoma Court of Criminal Appeals. This appeal was denied on July 9, 1987. Liles v. State, No. PC-87-391. A second Petition for Writ of Certiorari was filed with the United States Supreme Court. This petition was also denied.

Liles v. Oklahoma, 484 U.S. 933 (1987), reh'g denied, 484 U.S. 1021 (1988).

The petitioner filed a second Application for Post-Conviction Relief and this application was likewise denied without a hearing on June 11, 1988, by The Honorable Leamon Freeman, District Judge. The Oklahoma Court of Criminal Appeals affirmed the denial of relief on April 25, 1989. On October 30, 1989, the United States Supreme Court denied the petitioner's third Petition for Writ of Habeas Corpus. Liles v. Oklahoma, 110 S. Ct. 353 (1989).

In this Court, the petitioner raised thirteen grounds of error in his Petition for Writ of Habeas Corpus, as amended. Respondents James Saffle, Warden, Oklahoma State Penitentiary, Gary Maynard, Director, Oklahoma

Department of Corrections, and Robert H. Henry, Attorney General of Oklahoma,[4] responded in opposition.

Petitioner Liles also filed a Motion for Summary Judgment seeking summary adjudication of the first of his thirteen grounds of error based upon on his contention that the issue raised therein was dispositive of this action. At the request of the petitioner, the Court heard oral argument on the Motion for Summary Judgment. At the conclusion

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[4] In the response, Attorney General Henry sought dismissal on the ground that he was not a proper respondent. Rule 2(a), Rules Governing Section 2254 Cases in the United States District Courts, provides that "the state officer having custody of the [petitioner] shall be named as respondent." Thus, Attorney General Henry is entitled to the requested dismissal. The Court notes that no such argument was made on behalf of respondent Maynard and thus, he remains a party to this litigation.

of the hearing, the Court advised the parties that resentencing of petitioner Liles was warranted. The Court took under advisement whether a new trial was likewise warranted. This Order memorializes the Court's determination with regard to resentencing and sets forth its determination with regard to retrial.[5]

In discussing the issue raised in the Motion for Summary Judgment, the Court finds it unnecessary to recite in detail the events giving rise to the petitioner's conviction and sentence of death except to state that Mr. Yarbrough

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[5] While the petitioner in his Motion for Summary Judgment sought immediate release and dismissal of the state action, the Court has considered only the alternative relief requested: retrial and sufficient funds to explore the issue of mental illness.

was stabbed seven times by the petitioner during a robbery. The robbery occurred in a motel room to which Mr. Yarbrough had been lured by Gail Marie Conner, the girlfriend of the petitioner's brother, Daniel Gene Liles. Mr. Yarbrough's body was put in a trunk where it was discovered three days later near the South Canadian River.

In his Motion for Summary Judgment, the petitioner has argued that he was deprived of his rights to due process of law and equal protection under the laws in violation of the fourteenth amendment to the United States Constitution under Ake v. Oklahoma, 470 U.S. 68 (1985).[6]

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[6] Because Ake was decided while the petitioner's case was on direct appeal to the Oklahoma Court of Criminal Appeals, there is no issue of retroactivity presented in this case. See Griffith v. Kentucky, 479 U.S. 314 (1987). There is likewise no dispute

In Ake, the United States Supreme Court held that the Constitution requires that a state provide access to the psychiatric assistance necessary to prepare an effective defense based on mental condition if a criminal defendant cannot otherwise afford such assistance.

Recognizing that a defendant's mental condition is not necessarily at issue in every criminal proceeding, the Supreme Court described the level of need for psychiatric assistance that was sufficient to trigger a state's obligation to provide funds.

The Supreme Court stated

> "that when a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the State must, at a minimum, assure the defendant

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regarding exhaustion of state court remedies.

> access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense."

Id. at 83. The Supreme Court also found that the assistance of a psychiatrist was warranted during capital sentencing proceedings when the "future dangerousness" of a defendant was a significant factor. Id.[7]

The United States Court of Appeals for the Tenth Circuit has stated that in order to satisfy Ake. a defendant's showing on this issue "must be clear and genuine, one that constitutes a 'close' question which may well be decided one

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[7] See, 470 U.S. at 92 (Rehnquist, J., dissenting)(majority's discussion regarding sentencing process should be treated as dicta). This view is not the law and this Court is obligated to apply the rule as stated in the majority opinion rather than a position expressed in the dissent.

way or the other. It must be one that is fairly debatable or in doubt." Cartwright v. Maynard, 802 F.2d 1203, 1211 (10th Cir. 1986), rev'd on other grounds. 822 F.2d 1477, 1478 n.2 (10th Cir. 1987)(en banc), aff'd, 486 U.S. 356 (1988). The Tenth Circuit has also stated that a court presented with a petition for writ of habeas corpus should engage in a "review of the entire record," 802 F.2d at 1212, to determine whether the petitioner "could have made a threshold showing under Ake that 'his sanity at the time of the offense is to be significant factor at trial . . . ." Id. In the instant case, the entire record includes pretrial and trial papers and proceedings, the petitioner's records from Eastern State Hospital in Vinita, Oklahoma, the petitioner's

medical records from the Oklahoma County Jail and affidavits from a family member and acquaintances which provide information regarding the petitioner's background and in particular, his life in Sandstone, West Virginia.

Pretrial and Trial Papers and Proceedings

On February 9, 1983, J. Thomas Elliott, court-appointed counsel for the petitioner, filed an Application for Determination of Competency wherein he stated (1) that the petitioner was currently incompetent to proceed, (2) that the petitioner was unable to comprehend his attorney or assist in his defense and (3) that the petitioner's mental state and communication abilities were such that they seriously interfered with his understanding of the proceedings against him and with his

ability to aid in preparation for trial. On the same day, The Honorable Homer Smith, District Judge, at the petitioner's request, waived the notice requirement for a determination of competency and set a hearing on February 10, 1983, to resolve the issue "[f]or the reason that it appear[ed] to the court that [the petitioner was] unable to communicate with his attorney to inform him of any relative residing within or outside the State of Oklahoma."

On February 10, 1983, Judge Smith issued an Order committing petitioner Liles to the custody of the Oklahoma Department of Mental Health for observation and examination. In his Order, Judge Smith wrote "that there is a doubt as to the present competency of

the [petitioner], by reason of personal observation . . . by this Court; and testimony regarding [the petitioner's] ability to understand the proceedings against [him] and the [petitioner's] capability of aiding the attorney in preparation for trial." Pursuant to this Order, petitioner Liles was taken on February 15, 1983, to Eastern State Hospital for evaluation.

Prompted by a letter dated March 9, 1983, from R.D. Garcia, M.D., chief forensic psychiatrist at Eastern State Hospital, indicating that the petitioner was competent, the prosecutor, assistant district attorney Virgil "Chuck" Black, on March 15, 1983, applied to the state court for a post-examination competency hearing. While a hearing was scheduled for March 21, 1983, no hearing in fact

occurred. Rather, the then-assigned judge, The Honorable Raymond Naifeh, based upon Dr. Garcia's letter alone, declared the petitioner competent and ordered the proceedings to resume.

In his letter, Dr. Garcia wrote that

> "[s]ince it is the consensus of our staff that Mark Roy Liles is not in need of psychiatric/treatment, we would therefore consider him as competent to stand trial at this time."

Dr. Garcia wrote further that

> "[t]here has been no behavior displayed on the part of Mark Roy Liles to indicate to the staff that he would be considered to be dangerous to himself and/or others in society, at least not as a result of any overt psychotic symptoms elicited during his period of confinement in this hospital."

Dr. Garcia however also added that the petitioner was

> "being maintained on . . . Thorazine 50 mgms. t.i.d.; Tegretol 200 mgms. b.i.d.; and Cogentin 2 mgms. b.i.d.

> (discontinue after two weeks). We would of course recommend that this treatment be continued in order for him to retain his present degree of stability. We might suggest that he would be referred to a mental health clinic in his locale for follow-up care on an outpatient basis as might be indicated."[8]

On May 3, 1983, counsel for the petitioner filed a motion wherein he sought funds to employ certain experts.[9] In the motion he stated that he required the assistance of experts "[i]n order to present an effective defense," and

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[8] Thorazine is indicated for the management of manifestations of psychotic disorders. Physician's Desk Reference (44th ed. 1990) at 2116. Tegretol is an anticonvulsant. Id. at 990. Cogentin is indicated for use as an adjunct in the therapy of all forms of parkinsonism and in the control of extrapyramidal disorders. Id. at 1337.

[9] Counsel sought funds to employ (1) a psychologist, psychiatrist and/or education testing specialist, (2) a parole and probation expert and (3) a sociologist and "expert on the death penalty."

"further . . . to present evidence in mitigation as constitutionally allowed and mandated by the United States Supreme Court . . . ."

In particular, counsel stated that he needed

> "to employ a psychologist or psychiatrist to perform intelligence or personality tests on the [petitioner]."

Counsel stated that he had

> "reason to believe that [the petitioner] suffers from mental disease or defect, that would affect his capacity to appreciate the wrongfulness of his conduct or conform his [conduct] to law."

Defense counsel added that he was not contending

> "that his client cannot aid nor assist him, in fact contends that his client can aid and assist him in presenting a rational defense, but [that he] is concerned that at the time of the alleged commission of these acts, the defendant may have been suffering from such mental disease as to prevent his ability from distinguishing right

from wrong."

Counsel stated further that

> "[t]he need for a psychologist [or] psychiatrist is clear. The facts of this case involve robbery and murder. Clearly, there is a need to determine whether the [petitioner] had the ability to distinguish right from wrong at the time he allegedly committed these particular acts. A determination of this fact is relevant and material in determining guilt. It is further necessary for determining mitigating circumstances . . . ."

No funds were provided to employ any of the requested expert witnesses and the matter proceeded to trial with Judge Myers presiding.

The Oklahoma Court of Criminal Appeals found no error in this denial of funds since the petitioner had not pled or attempted to prove a defense of insanity and since, in applying for the funds, the petitioner had failed to show cause for doubting his sanity. 702 P.2d

at 1034; see id. at 1037 (Brett, specially concurring)("[D]efendant failed to raise any question as to his sanity.").

The Honorable Edgar H. Parks, Presiding Judge, in his dissent found that the petitioner had made the necessary preliminary showing under Ake that his mental state at the time of the offense was likely to be a significant factor at both the guilt and the sentencing stages of his trial. Judge Parks wrote:

> "First, [the petitioner] made a request for a court appointed psychiatrist and other expert assistance. Such a request should put a trial court on notice that expert testimony might play a significant part at trial. Second, the trial court had previously complied with [the petitioner's] request and ordered a psychiatric examination on the question of his competency to trial. Third, the psychiatric report indicated that it was the

'consensus' of the staff doctors that the [petitioner] was not in need of psychiatric treatment and was competent to stand trial. Consensus is an ambiguous term. It may mean unanimity or it may mean majority. Webster's New Collegiate Dictionary (1979). Therefore, the trial court was aware that there might possibly be some disagreement among the doctors as to [the petitioner's] mental condition. Further, the psychiatric report indicated that during the period of the psychiatric examination, the [petitioner] was being maintained on 150 milligrams of Thorazine per day. Thorazine is an extremely powerful psychotropic drug. Its most common use is for the management of manifestations of psychotic disorders. See Physician's Desk Reference (39th ed. Barnhart 1985), at 1977. In a special warning box, the Physician's Desk Reference states that Thorazine 'is not the first drug to be used in therapy for most patients with non-psychotic anxiety because certain risks associated with its use are not shared by common alternative treatments . . . . When used in the treatment of non-psychotic anxiety [it] should not be administered in doses of not more than 100 mg. per day . . . .' Id. Therefore, assuming that the State's doctors were following

standard medical practice, the fact that [the petitioner] was being maintained on 150 milligrams of Thorazine per day strongly indicates that the doctors were concerned with 'the management of manifestations of psychotic disorders.' Fifth, the psychiatric report recommended that the [petitioner] continue his Thorazine treatment 'in order for him to retain his present degree of stability.' The fact that Thorazine therapy was administered during the [petitioner's] psychiatric examination and the recommendation for continuation belie the psychiatric report's assertion that the [petitioner] was 'not in need of psychiatric/treatment,' and indicate that the doctors entertained serious concern about his mental stability. Sixth, the doctor's concern about [the petitioner's] mental condition was further illustrated by the fact that the psychiatric report suggested that [the petitioner] be referred 'to a mental health clinic in his locale for follow-up care on an out-patient basis as might be indicated.' Seventh, the psychiatric report stated: 'There has been no behavior displayed on the part of [the petitioner] to indicate to the staff that he would be considered to be dangerous to himself and/or others in society, at least not as a

> result of any overt psychotic symptoms elicited during his period of confinement in this hospital.' Given the fact that the State was specifically alleging the aggravating factor of future dangerousness, this statement alone should be sufficient to alert a trial court to the fact that the [petitioner's] state of mind was likely to be a significant factor at the sentencing stage of the trial. Finally, contrary to the majority's assertion, the state raised the issue of the relevance of the [petitioner's] state of mind by charging him with the aggravating factor of future dangerousness and introducing police and other testimony in an attempt to meet its burden of proof."

Id. at 1039-40.

Eastern State Hospital Records

The records of the petitioner's hospitalization from February 15, 1983, to March 17, 1983, at Eastern State Hospital contain the following entries:

a. Lance A. Portnoff, Ph.D., a clinical neuropsychologist, examined the

petitioner and in a report dated February 25, 1983, wrote that his findings

> "are suggestive of bilateral temporo-limbic dysfunction secondary to brain trauma and polydrug abuse. These findings are consistent with the reported episodes of dyscontrol, which can occur with such a locus of damage because of irritation or disinhibition of limbic structures mediating instinctual aggressive drives. . . . [T]he behavior described by the patient is consistent with an organic intermittent explosive disorder secondary to traumatic contusion of mesial hemisphere structures. Such patients have diminished control over aggressive patterns of response, particularly if further disinhibiting influences such as drugs or alcohol are ingested. Because of the close proximity of limbic aggressive and memory structures, often the irritative effect which triggers tendencies for explosiveness also impairs memory encoding for the duration of the irritative ictus. . . .
>
> "In terms of competency, the patient has a factual and rational understanding of the charge against him. However, because of

> his depression, he cannot consult with a lawyer in the rational preparation of his defense. He claims that he wants to die and does not wish to prolong the agony by defending himself in court. This suggests that the patient has a self-defeating attitude and would not be expected to defend himself capably."

Dr. Portnoff noted further that

> "[t]aken together with the available historical and behavioral data, these test findings are more consistent with a non-psychotic than a psychotic mental status, characteristic of . . . [a]djustment disorder with mixed emotional features[,] [o]rganic personality syndrome (intermittent explosive disorder)[,] [a]lcohol abuse, continuous[,] [m]ixed substance abuse, unspecified[, and] [m]ild focal brain damage secondary to cerebral trauma . . . ."

He concluded his report by stating that "[b]ecause of his depression, the patient is currently not competent to stand trial."

b. A treatment team progress note on March 1, 1983, indicated that the

petitioner was experiencing "strong inner feelings of wrath and anger" that he (the petitioner) believed to be the product of possession by a "violent alter ego" named "Rock."

c. A treatment team progress note made three days later by Dorothy Sherwood, R.N., indicated that the petitioner was very angry and stated that he would "kill someone on the ward before the night [was] over." The petitioner claimed to be no longer himself, having become "Rock" and that "'Rock' would take care of things." The petitioner further claimed that "Rock" had committed the murder giving rise to his conviction.

d. The petitioner was released on March 17, 1983, and a discharge summary prepared by Dr. Garcia stated the final

forensic diagnosis was inter alia dysthymic personality disorder and intermittent explosive disorder. Dr. Garcia also wrote that the petitioner "was behaving well and there was no problem in his management." He noted however

(1) that the petitioner had to be secluded for "combative behavior" on February 18 and March 3, 1983;[10]

(2) that on March 3, 1983, a "definite sociopathic behavior" was indicated;

(3) that the petitioner was given Thorazine 100 mg. orally on February 25, 1983, and again on February 26, 27 (Concentrate), 28 (75 mg. IM STAT) and

---

[10] A treatment team progress note indicates that the petitioner was also secluded on March 4, 1983.

29, 1983, for his combative or agitated behavior;

(4) that the petitioner was given Thorazine Concentrate 100 mg. four times a day for this behavior and this medication continued in that amount to March 7, 1983, when it was reduced to 50 mg. three times a day;

(5) that due to depression and threatened suicide, minimal precautions were taken; and

(6) that on the very day of his release, the petitioner was given Ativan 2 mg. STAT for agitation.

Dr. Garcia also wrote that the petitioner

> "may be considered potentially dangerous, daring, with temper tantrums and a short fuse, very easily ready to fight, as an aggressive and explosive individual, but not psychotic."

Dr. Garcia concluded his report by

recommending that the petitioner

> "continue to take Tegretol 200 mg. three times a day in order to curb behavior only and no neurotropic or psychotropic medication necessary. Refer to outpatient clinic for periodic checkup. He is definitely competent in a psychiatric, sociological and legal point of view at this time."[11]

The petitioner has also submitted the affidavit of Dr. Portnoff wherein he states:

> "4. The results of my evaluation [of the petitioner in 1983] were consistent with the presence of an organic impairment, or physical dysfunction to Mr. Liles' brain. The results suggested the presence of an organic intermittent

---

[11] As stated, Dr. Garcia in his letter dated March 9, 1983, wrote however that the petitioner was 'being maintained . Thorazine 50 mgms. t.i.d.; Tegretol 200 mgms. b.i.d.; and Cogentin 2 mgms. b.i.d. (discontinue after two weeks)" and further that "[w]e would of course recommend that this treatment be continued in order for him to retain his present degree of stability."

explosive disorder secondary to traumatic contusion of mesial hemisphere structures. Persons experiencing this problem may have a diminished ability to control aggressive impulses, and, as a result of damage to their brains, they may be capable of explosive, violent behavior during ictal, or seizure-like states. They may then have no memory or impaired memory of their violent behavior.

"5. I further concluded that Mr. Liles was not competent to stand trial. I found that he was experiencing depression to the extent that he could not consult with a lawyer in the rational preparation of his defense. Despite my opinion of Mr. Liles' incompetency to stand trial, I was considered a consultant only, and was not a part of the forensic team assigned to Mr. Liles at Eastern State Hospital. At that time it was the policy of Eastern State Hospital to report to the trial courts only the opinion on competency of the then Chief Forensic Psychiatrist, Dr. R.D. Garcia. Any dissenting

views from other staff members were not reported. At that time Dr. Garcia's view of competency to stand trial evaluations would have prevented him from considering either Mr. Liles' depression or his apparent brain damage in determining competency. Dr. Garcia was of the belief that only psychotic individuals could be considered incompetent, and any individual who was non-psychotic was therefore competent.

. . . .

"7. In order to adequately determine the extent of Mr. Liles' organic impairment I would have wanted to obtain as much historical information as possible concerning Mr. Liles' head injuries, hyperactivity, trance-like states, seizures, and headaches. I also think that further testing should have been done. This testing should have included a sleep deprived EEG, a CT-SCAN, and a complete neurological workup. However, while I was employed at Eastern State Hospital it was almost impossible to have such

> additional testing approved, especially for patients admitted for competency determinations, because of security precautions and budgetary constraints.

. . . .

> "9. In the time I was employed at Eastern State Hospital by far most of the patients I saw there I considered to be competent. In my opinion Mr. Liles' depression and incompetency [were] very real, and he was in no way malingering."

Affidavit of Lance A. Portnoff, Ph.D. (March 17, 1990).

Russell R. Monroe, a medical doctor and a Professor of Psychiatry at the University of Maryland School of Medicine, Baltimore, Maryland, who specializes in the study of certain forms of brain disease and human behavior, also has submitted an affidavit to the Court at the request of the petitioner's counsel. Dr. Monroe

states in his affidavit that after having reviewed the petitioner's records from Eastern State Hospital, that he has

> "concluded that there is a significant possibility that Mr. Liles experiences an episodic behavioral disorder associated with a limbic ictus. Such a condition may lead an individual to commit acts of violence over which he lacks control in an ordinary sense, and which are not in an ordinary sense intentional. The possibility of a behavioral disorder associated with a limbic ictus is consistent with the findings in the February 25, 1983 neuropsychological evaluation conducted by L.A. Portnoff, Ph.D."

Dr. Monroe states further that

> "[a]dditional study and evaluation are indicated to determine whether Mr. Liles experiences an episodic behavior disorder associated with a limbic ictus, and whether such a condition contributed to the killing of Joe Yarbrough . . . . Further evaluation of Mr. Liles could include these steps: (1) Obtaining a sleep deprived electroencephalogram (EEG). . . . (2) Observing the effects of anti-convulsant medication. If Mr. Liles' propensity to violent outbursts is controlled by

anticonvulsant medication, this would be strong circumstantial evidence that his behavior has its roots in an organic brain disorder. (3) The development of a more detailed history, or phenomenology, of Mr. Liles' explosive behavior.

"In addition, study of the circumstances of Mr. Yarbrough's killing, and of Mr. Liles' behavior surrounding the time of Mr. Yarbrough's killing, would be necessary before forming an opinion of the relationship between a disorder similar to the sort that I have been discussing and the killing of Mr. Yarbrough.

"In my opinion, further evaluation along the lines that I have outlined here is necessary, and is justified by the significant possibility that if Mr. Liles indeed killed Mr. Yarbrough, he did so as a result of a brain disorder that produced a seizure-like event."

Affidavit of Russell R. Monroe, M.D. (October 24, 1988).

Oklahoma County Jail Medical Records

The medical records from the Oklahoma County Jail where the petitioner was

incarcerated after his release from Eastern State Hospital and prior to trial reflect treatment with the medication prescribed by Dr. Garcia. They also indicate that the petitioner was treated with Haldol[12] during his incarceration.

Affidavits

The petitioner has presented affidavits from LaDonna Meadows, the petitioner's mother, and from acquaintances who knew the petitioner when he lived in Sandstone, West Virginia. The petitioner moved to Sandstone in 1976 when he was fourteen years old. His mother had married for the fifth time and she and her husband,

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[12] Haldol is indicated for use in the management of manifestations of psychotic disorders. Physician's Desk Reference (44th ed. 1990), at 1282.

Jim Meadows, moved to Sandstone with her four children - Daniel Gene, Mark Roy, Mike and Casey. The affidavits were offered to describe the petitioner's behavior and his development as well as to offer reasons why behavioral changes may have occurred.

Mrs. Meadows in her affidavit recounted events in the petitioner's life including abuse, both physical and sexual, periods of head banging, an automobile accident when the petitioner was three or four years old in which the petitioner's head went through the vehicle's windshield, repeated headaches and episodes of sleep walking. Affidavit of LaDonna Meadows (March 21, 1990). She also stated that

> "[t]here were times when Mark would only respond to you if you called him by the name 'Rock.' There were times that he would

> disappear into the woods for days, and not remember much about it."

Id. at 4.

One individual, Chuck Richmond, stated in his affidavit that when the petitioner was fourteen years old, while climbing a cliff, he (the petitioner) slipped and fell approximately fifteen feet. This affiant stated that the petitioner "must have hit his head because he was knocked out cold" and that "he was addled for quite awhile afterwards." Affidavit of Chuck Richmond (March 16, 1990).

Findings and Conclusions

Summary Judgment is appropriate in this case as in any civil action only if the Court is satisfied that no genuine issue of material facts exists and that the moving party is entitled to judgment as a matter of law. Rule 56(c),

F.R.Civ.P. The Court must view the evidence[13] presented in the light most favorable to the respondents as the parties opposing summary judgment and then decide whether such evidence "presents a sufficient disagreement to require submission to the [ultimate factfinder] or whether it is so one-sided that one party must prevail as a matter of law." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-52 (1986). The Court is mindful that in cases where there is a conflict in the

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[13] The respondents did not agree that certain material facts were not in dispute. But in challenging these facts, the respondents merely rested on denials in their pleadings or stated "that they [were] without sufficient knowledge or information to form a belief as to the truth of the facts asserted . . . ." Rule 14(B), Rules of the United States District Court for the Western District of Oklahoma, and extant case law require more to establish that facts are in dispute.

evidence or whether different inferences are permissible under uncontroverted facts, summary judgment is not proper and the issues should be reserved for resolution at a later stage. In this case, the Court finds that no genuine issue as to any material fact exists which renders summary adjudication inappropriate on the issue raised in the Motion for Summary Judgment and further, that the petitioner is entitled as a matter of law not only to resentencing but also to a new trial.

The petitioner is not required at this stage to prove that he was in fact mentally ill at the time the crime was committed or that experts hold such opinion and the Court, by granting the requested relief, is not expressing any opinion as to the petitioner's mental

state on or about August 27, 1982. Rather, the Court opines only that the entire record demonstrates that the petitioner could have made the threshold showing under Ake that his mental state at the time of the offense was likely to be a significant factor at trial. The issue of mental illness is clear and genuine; it "constitutes a 'close' question that may well be decided one way or the other." 802 F.2d at 1211.

Indeed, the Supreme Court did not attempt in Ake to establish a procedure whereby independent psychiatric examination could determine the validity of a criminal defendant's defense of insanity. Rather, the opinion in Ake is directed to providing a criminal defendant with "the 'basic tools of an adequate defense,'" 470 U.S. at 77

(quoting Britt v. North Carolina, 404 U.S. 226, 227 (1971)), and reaffirms "that fundamental fairness entitles indigent defendants to 'an adequate opportunity to present their claims fairly within the adversary system.'" Id. at 77 (quoting Ross v. Moffitt, 417 U.S. 600, 612 (1974)). Ake recognizes that

> "when the State has made the defendant's mental condition relevant to his criminal culpability and to the punishment he might suffer, the assistance of a psychiatrist may well be crucial to the defendant's ability to marshal his defense. In this role, psychiatrists gather facts, through professional examination, interviews, and elsewhere, that they share with the judge or jury; they analyze the information gathered and from it draw plausible conclusions about the defendant's mental condition, and about the effects of any disorder on behavior; and they offer opinions about how the defendant's mental condition might have affected his behavior at the time in question. They know the

> probative questions to ask of the opposing party's psychiatrists and how to interpret their answers. 'Unlike lay witnesses, who can merely describe symptoms they believe might be relevant to the defendant's mental state, psychiatrists can identify the 'elusive and often deceptive' symptoms of insanity, Solesbee v. Balkcom, 339 U.S. 9, 12 (1950), and tell the jury why their observations are relevant. Further, where permitted by evidentiary rules, psychiatrists can translate a medical diagnosis into language that will assist the trier of fact, and therefore offer evidence in a form that has meaning for the task at hand. Through this process of investigation, interpretation, and testimony, psychiatrists ideally assist lay jurors, who generally have no training in psychiatric matters, to make a sensible and educated determination about the mental condition of the defendant at the time of the offense."

470 U.S. at 80-81.

Ake does not guarantee a psychiatrist who will reach only favorable conclusions. It guarantees only that once a defendant has demonstrated that

his mental condition at the time of the offense is to be a significant factor at trial, he be permitted the opportunity to determine if a defense based on mental condition is viable and if so, the further opportunity to present that defense effectively. And in capital cases, Ake allows defense counsel the opportunity to attempt to portray a defendant's crime as understandable in light of the unique circumstances affecting that defendant's development and behavior and to rebut evidence of circumstances in the defendant's background that the state has introduced to prove the existence of aggravating circumstances. The denial of the instant petitioner's Motion for Funds for Expert Witness foreclosed these opportunities.

The record demonstrates that the petitioner's request for funds was not based on general allegations of need. The seven factors articulated by Judge Parks in his dissenting opinion demonstrate that further inquiry and investigation by one trained in psychiatric matters was demanded. These factors coupled with the remaining evidentiary submissions and particularly the records from Eastern State Hospital clearly evince the need for the assistance of a psychiatric expert.

The respondents' primary arguments in opposition to the petitioner's entitlement to the assistance of a psychiatrist are (1) the petitioner never raised the defense of insanity at trial and (2) the state did not present a psychiatrist during the penalty phase

of the petitioner's trial. The Court finds these arguments are without merit.

As the Supreme Court stated in Ake. when jurors are considering the issues of mental illness and the likelihood of future dangerousness,

> "the testimony of psychiatrists can be crucial and 'a virtual necessity if an insanity plea is to have any chance of success.' By organizing a defendant's mental history, examination results and behavior, and other information, interpreting it in light of their expertise, and then laying out their investigative and analytic process to the jury, the psychiatrists for each party enable the jury to make its most accurate determination of the truth on the issue before them."

470 U.S. at 82 (footnote omitted). There is no requirement that the petitioner put forth a defense based upon mental condition without the services of a psychiatrist and fail to preserve his right to psychiatric

assistance in the first instance. Without the assistance of a psychiatrist, a defendant is handicapped in presenting evidence that would create sufficient doubt as to competency.[14]

The Court finds further that once the prosecutor has made the defendant's mental state relevant to his culpability[15] and particularly to the

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[14] "'[T]he minimum assurance that the life-and-death guess will be a truly informed guess requires respect for the basic ingredient of due process, namely, an opportunity to be allowed to substantiate a claim before it is rejected.'" Ford v. Wainwright, 477 U.S. 399, 414 (1986)(quoting Solesbee v. Balkcom, 339 U.S. 9, 23 (1950) (Frankfurter, J., dissenting)).

[15] Mental state was relevant to the petitioner's culpability. At the petitioner's request, the trial court instructed the jury on murder in the second degree. Only with the assistance of a psychiatrist can counsel make an informed decision either to show that an act was the product of mental illness or to not assert any defense of mental impairment.

punishment[16] the defendant might suffer

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[16] Despite the respondents' argument that the mental state of the petitioner was not an issue at trial, the prosecutor himself during his closing argument in the penalty phase stated:

"Something's happening--something happened to Mark Liles, something between the time he left West Virginia, Sandstone, West Virginia, for the Marine Corps and August of 1982 when he was in Oklahoma City. Something changed him.

"He's not the kid who did the things that his mother said he did--and I assume they were true. . . .

"Something happened to Mark Liles that changed him from the kid described by his parents to the man in Room 1208 at the Alamo Plaza; the man after that, the man who has yet to show the slightest sign of remorse, not a bit, nothing, certainly not to Joe Yarbrough at the time, who rapidly stabbed him in the chest. . . . [J]ust do it and take him and get his thirty dollars and it's over. That's all. Something is different about him."

Transcript of Stage II Proceedings (May 12, 1983), at 70, lines 321.

as in the instant case, the defendant's right to psychiatric examination and assistance is not dependent upon the prosecutor's tactical decisions regarding the use of psychiatric testimony. As Judge Parks stated in his dissent,

> "[t]he use of psychiatric testimony by the State to establish future dangerousness makes a defendant's need for expert assistance in the Supreme Court's formulation, compelling. However, such testimony should not be the triggering factor. A rule making the [petitioner's] right to assistance on this key issue depend on the prosecutor's discretion would be untenable."

702 P.2d at 1040 (emphasis deleted).[17] To hold otherwise in those instances where

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[17] Contra, Harris v. Vasquez, 913 F.2d 606 (9th Cir. 1990)(Ake does not recognize general right to psychiatrist in presentation of mitigation factors where state does not present psychiatric testimony to establish aggravating factors).

the mental state of the defendant is a significant factor in the penalty phase could restrict presentation of relevant mitigating evidence that is the hallmark of a constitutional capital sentencing scheme.

Accordingly, the Court finds that the petitioner's Motion for Summary Judgment is GRANTED and that his conviction in Case No. CRF-82-4268 is VACATED. The respondents are DIRECTED to release the petitioner from custody on the 91st day following the date of this Order and the Judgment entered pursuant hereto, unless, within 90 days from the date of this Order and Judgment, the State of Oklahoma has elected to retry the petitioner.

ENTERED this _____ day of November, 1990

_____
LEE R. WEST
UNITED STATES DISTRICT JUDGE

ORIGINAL

Supreme Court, U.S.
FILED
DEC 18 1991
OFFICE OF THE CLERK

Case No. 91-906

IN THE SUPREME COURT OF THE UNITED STATES
October Term 1991

JAMES SAFFLE, WARDEN, and
GARY MAYNARD, DIRECTOR,
OKLAHOMA DEPARTMENT OF CORRECTIONS,
Petitioners,

v.

MARK ROY LILES,
Respondent

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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STATEMENT OF THE CASE

The respondent, Mark Roy Liles, was convicted of murder and sentenced to die in the District Court of Oklahoma County, of the State of Oklahoma, Seventh Judicial District, in case number CRF-82-4268. Judgment and Sentence were entered, and a death warrant was issued July 11, 1983. After exhausting his state remedies through a direct appeal and two applications for post-conviction relief in state court, Mr. Liles on December 29, 1989, filed a petition for habeas corpus pursuant to 28 U.S.C. § 2254 in the United States District Court for the Western District of Oklahoma (case no. CIV-89-2271-W). Without objection, Mr. Liles submitted extensive evidence demonstrating that Mr. Liles's mental state would have been a significant factor at both stages of his trial in the state court. Petitioners Saffle and Maynard did not object to the District Court's receipt of this evidence, and they did not offer any controverting evidence of their own.

On November 7, 1990, the Honorable Lee R. West granted summary judgment for Mr. Liles and issued the writ of habeas corpus on the ground that Mr. Liles's rights under Ake v. Oklahoma, 470 U.S. 68 (1985), were violated when he was denied expert psychiatric assistance to aid in his defense. Judge West held that the uncontested evidence showed that Mr. Liles's due process and equal protection rights had been violated. Petitioners Saffle and Maynard appealed to the United States Court of Appeals for the

Tenth Circuit, which, on September 16, 1991, affirmed Judge West's judgment in all respects.[1]

The petitioners are now requesting a writ of certiorari to review the judgment of the Court of Appeals.

REASONS FOR DENYING CERTIORARI

This case is unsuitable for review by certiorari. The decision of the United States Court of Appeals for the Tenth Circuit was a straight-forward application of this Court's eight-to-one decision in Ake v. Oklahoma, 470 U.S. 68 (1985).[2] There was overwhelming evidence before the District Court -- all of it received without objection, and none of it controverted -- that Mr. Liles's mental health and his sanity were in issue, at both the guilt-innocence and the punishment stages of Mr. Liles's trial.

The Tenth Circuit's decision broke no new ground. It was based on the particular facts of this case. Like Ake himself, Mr. Liles was prosecuted in the courts of the State of Oklahoma for murder and was sentenced to death, at a time when the State of Oklahoma refused to provide any funds to indigent defendants for expert psychiatric assistance before or during trial, no matter how

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[1]On December 2, 1991, the Court of Appeals issued an order recalling its mandate and staying that mandate "until December 15, 1991, pending application to the Supreme Court for certiorari." The mandate of the Court of Appeals required the State to make its election within 90 days of that court's decision whether to retry Mr. Liles.

[2]Seven Justices joined Justice Marshall's opinion for the Court. Chief Justice Burger concurred in the judgment, stressing the unique need for fairness in capital cases. Then-Justice Rehnquist dissented.

compelling the need.[3] Mr. Liles, an indigent, requested such funds before trial so that he could defend on grounds of insanity and defend against the death penalty, but no funds were provided.

The Court of Appeals, affirming the decision of the District Court, held under the standards of Ake that the evidence proved that Mr. Liles's mental health was likely to be a significant factor at both his trial and his sentencing. Consequently, the Court of Appeals found that Mr. Liles's federal constitutional rights had been violated. The court held that the State of Oklahoma was required to provide Mr. Liles a new trial and a new sentencing.

In their effort to obtain this Court's review despite these circumstances, the petitioners have distorted the decision of the Court of Appeals and omitted even mentioning the critical facts on which that decision was grounded. The petitioners also are in error to suggest that the decision below in any way conflicts with other recent lower court decisions applying Ake.

In Ake v. Oklahoma, 470 U.S. 68 (1985), the Court held that, when sufficient need is shown, the Constitution requires the states to provide funds for psychiatric experts to indigent criminal

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[3]Because Ake was decided while Mr. Liles's conviction was still on direct appeal to the Oklahoma Court of Criminal Appeals and thus had not yet become final, this case presents no question of retroactivity, see Griffith v. Kentucky, 479 U.S. 314 (1987), and throughout these proceedings, the State of Oklahoma has conceded the fact that Mr. Liles is entitled to the full benefit of the Ake ruling. The State's repeated references in its petition, beginning with its statement of the question presented, to the fact that Mr. Liles's trial "occurred before the decision in Ake was handed down," see Petition, at i, 10, 17, is simply mystifying.

defendants in death penalty cases. Ake set aside the long-standing practice and policy in Oklahoma -- which prevailed at Mr. Liles's trial -- never to provide such funds, no matter how compelling the need.

This Court in Ake reaffirmed and enforced the basic tenet of our criminal justice system that:

> [F]undamental fairness entitles indigent defendants to "an adequate opportunity to present their claims fairly within the adversary system."

Id. at 77 (quoting Ross v. Moffitt, 417 U.S. 600, 612 (1974)). Thus the Constitution requires that an indigent defendant be provided with "the 'basic tools of an adequate defense.'" Id. (quoting Britt v. North Carolina, 404 U.S. 226, 227 (1971)).

So that he can have an "adequate opportunity" to defend, and can be possessed of the "basic tools of an adequate defense," an indigent defendant must be provided funds for expert assistance on mental health issues, when the defendant's mental state is likely to be a "significant factor" in his defense. The Court's opinion explained:

> When the defendant is able to make an ex parte threshold showing to the trial court that his sanity is likely to be a significant factor in his defense, the need for the assistance of a psychiatrist is readily apparent. It is in such cases that a defense may be devastated by the absence of a psychiatric examination and testimony; with such assistance, the defendant might have a reasonable chance of success. In such a circumstance, where the potential accuracy of the jury's determination is so dramatically enhanced, and where the interests of the individual and the State in an accurate proceeding are substantial, the State's interest in its fisc must yield.

. . . .

> We therefore hold that when a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense.

Id. at 82-83.

Moreover, this right to psychiatric assistance extends to sentencing proceedings in death penalty cases. Those critically important proceedings must be fundamentally fair:

> We have repeatedly recognized the defendant's compelling interest in fair adjudication at the sentencing phase of a capital case.

Id. at 83. Finding that Ake had been denied his federal constitutional right to independent psychiatric assistance at both stages of his case -- the "guilt-innocence" stage and the penalty stage -- the Court reversed his conviction and sentence. Id. at 86-87.

In the decision below, the Court of Appeals and the District Court merely applied Ake to the particular facts of this case. The petitioners have tried to tar the lower court's decision as an illegitimate or extreme extension of Ake, but the petitioners have misrepresented the lower court's holding, and they have ignored the facts on which that holding was based.

1. The Tenth Circuit Did Not Require Funds For a Mental Health Expert "Merely on an Assertion that Such an Expert Would Be Beneficial and Could Possibly Provide Assistance."

The petitioners represent that the Court of Appeals held in this case that funds must be provided for a defense expert on mental health issues "merely on an assertion that such an expert would be beneficial and could possibly provide assistance," Petition, at 23, or "in any criminal case in which an expert could possibly be beneficial to the defense." Id. at 10.

In fact, the Tenth Circuit expressly rejected the very proposition that the petitioners attribute to it. The lower court's opinion could not be clearer. The court stated:

> General allegations supporting a request for court appointment of a psychiatric expert, without substantive supporting facts, and undeveloped assertions that psychiatric assistance would be beneficial to the defendant will not suffice to require the appointment of a psychiatrist to aid in the preparation of a criminal defense.

App., at 9.[4]

The lower court's opinion proceeded to review in detail the "substantive supporting facts" that had been received without objection in the District Court. This evidence included: findings and orders of the state trial court showing that Mr. Liles's mental stability was questionable, id. at 11-13; a letter of the chief

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[4]The District Court's opinion likewise found: "The record demonstrates that [Mr. Liles's] request for funds was not based on general allegations of need." The court concluded that the extensive evidence in the case, "particularly the records from Eastern State Hospital[,] clearly evince[d] the need for the assistance of a psychiatric expert." App., at 82.

forensic psychiatrist at Eastern State Hospital, where Mr. Liles was confined, attesting to Mr. Liles's enduring need for Thorazine, a powerful anti-psychotic medication, id. at 13-15; records showing the anti-psychotic medication that Mr. Liles continued to receive while awaiting trial in jail, id. at 15; Mr. Liles's behavior and treatment, as reflected in the Eastern State Hospital records, during his hospitalization there, id. at 17-19; diagnoses of depression and of suicidal tendencies in the hospital records, id. at 19-20; reports of Mr. Liles's possession "by a 'violent alter ego' named Rock," id. at 20; Mr. Liles's diagnosis at the hospital "as having a dysthymic personality disorder and an intermittent explosive disorder," id. at 21; results of a neuropsychological evaluation that Mr. Liles's explosive behavior was consistent with organic brain impairment, possibly the product of trauma, id. at 21-24; the affidavit of Russell R. Monroe, M.D., professor of psychiatry at the University of Maryland School of Medicine, corroborating these results and concluding that there is a "'significant possibility that if [respondent Liles] indeed killed Mr. Yarbrough, he did so as a result of a brain disorder that produced a seizure-like event,'" id. at 25; the conclusion of Lance A. Portnoff, Ph.D., consulting neuropsychologist at Eastern State Hospital, that Mr. Liles was not competent for trial, id. at 25-26; and evidence from Mr. Liles's earlier life concerning head injury,

physical and sexual abuse, psychological problems and treatment, and episodes of explosive and bizarre behavior. Id. at 27-30.[5]

Only after its detailed review of this voluminous evidence, the Court of Appeals concluded:

> In light of [respondent Liles's] history of mental problems, his treatment with antipsychotic medication, and the conflicting diagnoses of his incompetency and his mental condition in general, this record sufficiently supports the district court's determination that [Mr. Liles] could have made a sufficient showing under Ake, that his sanity was likely "to be a significant factor at trial."

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[5]The certiorari petition contends that "[t]he Tenth Circuit wrongly considered" some of the evidence that respondent Liles presented, namely Dr. Monroe's affidavit, and affidavits concerning Mr. Liles's upbringing and life history. Petition, at 18. It is sufficient answer that never before in these proceedings -- neither in the District Court nor in the Court of Appeals -- did petitioners Saffle and Maynard object to the courts' consideration of this evidence. Any objection made for the first time in a certiorari petition comes too late. E.g., EEOC v. Federal Labor Relations Authority, 476 U.S. 16, 24 (1986); see Rules--§ 2254 Cases, Rule 7(c); F.R.Civ.P. 46.

The petitioners also mischaracterize the hospital records that they concede the lower courts properly considered. According to the petition, those records "clearly indicated that the defendant, though perhaps mentally disturbed, was competent to stand trial, and was legally sane." Petition, at 18-19. The opinions of the Court of Appeals and the District Court explain, to the contrary, that the hospital records are replete with findings and suggestions that Mr. Liles was incompetent to stand trial and could behave explosively during a seizure-like state, because of an organic brain impairment. See App., at 19-24, 25-27, 61-70. To be sure, the chief forensic psychiatrist reported to the court that Mr. Liles was competent to stand trial, but he never disputed the organic origins of Liles's explosive behavior, and a number of hospital entries contradict his competency finding. Moreover, to be entitled to expert funds, a defendant does not need to carry the burden of proving that an insanity defense is unanimously supported by expert opinion and will succeed, or that he will in fact avoid the death penalty because of uncontested evidence of mental impairment. What Ake guarantees is the tools necessary for an adequate defense, and this right does not evaporate merely because the state, at trial, might have some basis to contest that defense.

Id. at 31 (quoting Cartwright v. Maynard, 802 F.2d 1203, 1212 (10th Cir. 1985), rev'd on other grounds, 822 F.2d 1477 (10th Cir. 1987) (en banc), aff'd, 486 U.S. 356 (1988)).

There is no basis whatever for the petitioners' statement that the Court of Appeals found Ake to be triggered "merely on an assertion that [a mental health] expert would be beneficial and could possibly provide assistance." Petition, at 23. The Court of Appeals found that Ake was triggered because, among other reasons, there was extensive, unchallenged documentation of Mr. Liles's mental illness and organic impairment. The evidence raised the distinct possibility that the killing for which Mr. Liles was convicted was the product of a seizure-like event, due to organic brain impairment. The evidence also showed that Mr. Liles had been diagnosed as incompetent at the time of his release from Eastern State Hospital. When the state denied Mr. Liles any funds for expert assistance at his trial, it deprived him of the tools essential to his defense.

2. The Tenth Circuit's Decision Does Not "Make[] a Mental Health Expert an Integral Part of Every Criminal Trial Which Involves a Crime Requiring Specific Intent."

Equally unfounded is the petitioners' description of the decision below as "mak[ing] a mental health expert an integral part of every criminal trial which involves a crime requiring specific intent." Petition, at 11.

First, as has just been stated, the foundation for the decision below was extensive evidence that Mr. Liles suffers from

mental and organic problems that could have led to the killing of Mr. Yarbrough, or that could lessen the punishment that Mr. Liles might deserve for that killing. Nothing in the lower court's opinion requires that funds must be provided where no similar evidence of mental illness is presented.

Beyond this, the petitioners ignore the fact that respondent Liles attempted to raise the insanity defense, not merely negate a specific intent element of the crime, but the state's refusal to provide funds thwarted this effort. Defense counsel's pre-trial request for funds specifically stated that a psychiatrist or psychologist was necessary to develop an insanity defense. The motion requesting funds asserted that there was "reason to believe that [respondent Liles] suffers from mental disease or defect, that would affect his capacity to appreciate the wrongfulness of his conduct or conform his [conduct to the] requirements [of the] law." App., at 32. Further, the motion averred that an expert was necessary because "there is a need to determine whether [respondent Liles] had the ability to distinguish right from wrong," an issue that "is relevant and material in determining guilt." Id.

The evidence that the District Court considered, and the Court of Appeals reviewed, incontestably shows that, with expert assistance, respondent Liles might have defended successfully on grounds of insanity. The evidence raises the possibility that at the time of the killing, Mr. Liles was "possessed by a 'violent alter ego' named Rock." App., at 20. The evidence also raises the possibility that Mr. Liles's conduct was the product of a "seizure-

like event," which resulted in violent behavior "over which [respondent Liles] lack[ed] control, and which [was] not in any ordinary sense intentional.'" Id. at 24.

Yet again, the petitioners also ignore the Tenth Circuit's own words. The court found that expert assistance was required, because an expert was necessary "to assist the defense in determining whether an insanity defense [was] viable or warranted under the circumstances . . . ." Id. at 33 (emphasis supplied).

On this issue also, petitioners Saffle and Maynard have misstated what the Tenth Circuit actually held, and have ignored the evidentiary basis for its holding.

3. The Tenth Circuit Did Not Require Appointment of a Mental Health Expert "Any Time the Aggravating Circumstance of Continuing Threat to Society Is Alleged."

Further mischaracterizing the decision below, petitioners Saffle and Maynard contend that the Court of Appeals has held that Ake's requirements are triggered "any time the aggravating circumstance of continuing threat to society is alleged," and "in all cases where continuing threat to society is alleged . . . ." Petition, at 13.

Yet again, the petitioners have ignored the actual basis for the lower court's holding. The lower court's opinion emphasized two factors: that the prosecutor explicitly placed Mr. Liles's mental state in issue; and that the evidence in this particular case showed that Mr. Liles had been denied the tools that were necessary to a fair defense. The Court of Appeals explained:

> In this case, because the state presented evidence concerning [respondent Liles's] future dangerousness, albeit not psychiatric evidence, and because [respondent Liles] established the likelihood that his mental condition could have been a significant mitigating factor, the district court correctly determined that the state trial court deprived [respondent] of due process by denying him court-appointed psychiatric assistance at the sentencing phase of his trial.

Id. at 37 (emphasis supplied).[6]

4. The Tenth Circuit's Decision Is Not in Conflict With Any Other Decision Cited in the State's Petition.

The certiorari petition suggests that the decision below marks a departure from the application of Ake in other recent decisions, and creates a conflict among the lower courts. Petition, at 15-17, 21-22. Yet the Court of Appeals in this case hewed to Ake's specific holding, and created no conflict at all. Petitioners Saffle and Maynard cite principally four cases: Harris v. Vasquez, 943 F.2d 930 (9th Cir. 1991); Christenson v. State, 261 Ga. 80, 402 S.E.2d 41, cert. denied, 112 S. Ct. 166 (1991); State v. Roper, 328 N.C. 337, 402 S.E.2d 600, cert. denied, 112 S. Ct. 280 (1991); and State v. Owens, 248 Kan. 273, 807 P.2d 101 (1991).

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[6]Likewise, the District Court based its holding that respondent was entitled to expert assistance at the second (sentencing) stage of the state court proceedings on two particular circumstances. First, the prosecutor explicitly made Mr. Liles's mental state relevant to his punishment. App., at 84-85 & n.16. Second, the facts showed that "the mental state of the defendant [was] a significant factor in the penalty phase" of Mr. Liles's trial. App., at 87.

The decision of the Court of Appeals in the present case does not conflict with any of these four decisions. In suggesting that there is a conflict, the petitioners yet again ignore what the Court of Appeals has actually held, and they overlook the facts on which that holding was actually based.

In Harris v. Vasquez, supra, the Ninth Circuit considered Harris's claim that his rights under Ake were violated, despite the fact that Harris was provided funds to hire, and did hire, two defense psychiatrists before his trial. Harris nonetheless maintained that he was entitled to habeas corpus relief, on the asserted ground "that his two defense psychiatrists incompetently performed their evaluations of him." 943 F.2d at 930. The Ninth Circuit rejected this claim, saying:

> Under Ake, the state must provide an indigent defendant with access to psychiatric assistance at the guilt phase of a trial, when the defendant has demonstrated that his sanity at the time of the offense is likely to be a significant factor in determining guilt. [Ake v. Oklahoma, 470 U.S. at 83.]
>
> Harris's Ake claim to psychiatric assistance at the guilt phase fails because the state did in fact provide Harris with psychiatric assistance. The state provided Harris with access to any competent psychiatrist of his choice when it gave Harris the funds to hire two psychiatrists from the general psychiatric community. The state did not limit Harris's access to psychiatric assistance in any way.

Id. at 949.

There is no conflict at all between the Ninth Circuit's decision in Harris and the Tenth Circuit's decision here. Respondent Liles was denied the very right that Harris had been

provided, and which the Ninth Circuit in Harris v. Vasquez explicitly reaffirmed, namely the right to "access to psychiatric assistance . . . when the defendant has demonstrated that his sanity at the time of the offense is likely to be a significant factor in determining guilt."

Of the state cases that the petitioners cite, one, State v. Roper, supra, did not even involve a question of a defendant's entitlement to funds for a mental health expert. The defendant in that case cited Ake to argue that he should have been provided funds for a defense investigator. State v. Roper, 328 N.C. at 353, 402 S.E.2d at 609. Obviously enough, that issue raises different considerations from the factors that are relevant here. Nonetheless, the North Carolina Supreme Court reaffirmed its understanding that Ake requires the state to provide psychiatric assistance when it is shown "'either that without expert assistance [the defendant] will be deprived of a fair trial, or that there is a reasonable likelihood that it will materially assist him in the preparation of his case.'" Id. (quoting State v. Bridges, 325 N.C. 529, 532, 385 S.E.2d 337, 338 (1989)). Mr. Liles's rights under Ake were violated precisely because the denial of expert assistance deprived him of a fair trial, and because such assistance would have materially assisted him in the preparation of his case, and the Tenth Circuit correctly so held.

The petitioners' other state cases, Christenson and Owens, both stand for the unremarkable proposition that to be entitled to funds for a mental health expert, the defendant must show that his

mental health is likely to be a significant factor at trial. In Christenson, the Supreme Court of Georgia found that an Ake claim was unfounded because the defendant "presented no evidence by which the court could reasonably have inferred that the question of insanity would be a significant factor at the guilt phase of trial." Christenson v. State, 402 S.E.2d at 45, 261 Ga. at __. Nor was the defendant entitled to assistance at the penalty phase of his trial, for the evidence showed only "that the defendant is selfish and manipulative, lacks regard for the rights of others, has abused drugs and alcohol, and has committed numerous crimes. But it does not show that the defendant suffers from any serious mental disorder." Id.

In Owens, the defendant claimed before trial that he suffered amnesia and could not remember what had happened at the time of the crime. His attorney informed the trial court that a psychiatrist and sociologist already had examined Owens, and the attorney requested funds for additional testing that "could possibly retrieve Owens' memory or eliminate the possibility of feigned amnesia," but the request was denied. State v. Owens, 807 P.2d at 104, 248 Kan. at ___. On appeal of his conviction, Owens argued that the denial of funds violated his rights under Ake. The Supreme Court of Kansas affirmed. It found that "Owens has not made the threshold showing that the effect of amnesia upon his mental capacity was a significant issue for a defense to the charges." Id. at 108, 248 Kan. at ___. The reason was that Owens had admitted that he did not suffer from amnesia after all: The

pre-sentence report showed that "Owens explained to the court services officer after conviction that his failure to testify was because he was not with anyone at the time of the incident and he decided the jury would not believe him. No mention was made of amnesia." Id.

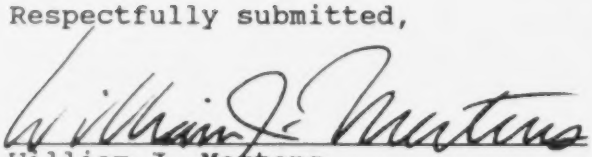
These three cases -- the Tenth Circuit's decision here, Christenson, and Owens -- together show only that three courts, applying essentially the same legal standard, have reached different results on different facts. In the present case, unlike the two state cases, there is substantial evidence that the defendant suffered from mental illness and organic brain impairment. In this case, the respondent Liles has shown that his mental state could have been a significant factor in his defense. The petitioners have shown no conflict at all between the decision below and any other decision that simply applies Ake to different facts.

CONCLUSION

Respondent, Mark Roy Liles, respectfully submits that the petition for a writ of certiorari should be denied.

Dated: December 18, 1991

Respectfully submitted,



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